

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DANIEL GABINO MARTINEZ, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case No. 3:13-cv-00554-MMD-VPC

ORDER

(Def.'s Motion for Judgment on the  
Pleadings - Dkt. No. 40).

**I. SUMMARY**

Before the Court is Defendant's Motion for Judgment on the Pleadings ("Motion"). (Dkt. no. 40.) For the reasons set forth below, the Motion is granted.

**II. BACKGROUND**

Plaintiffs Daniel Gabino Martinez, Ramona Hage Morrison, and Dalton Warren Wilson, appearing pro se, allege that they filed a Grazing Application with the Bureau of Land Management ("BLM") on April 25, 2013, seeking a water-based allotment pursuant to the Taylor Grazing Act. (See dkt. no. 1 ¶ 4.3.) Plaintiffs allege that as of the date they filed the Complaint, they had not received an answer to their Grazing Application. (See *id.*) As a result, Plaintiffs ask this Court to review the agency's action and/or inaction and seek declaratory judgment and equitable relief. (See *id.* at 1.)

**III. DISCUSSION**

**A. Legal Standard**

A Rule 12(c) motion for judgment on the pleadings utilizes the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be

1 granted in that it may only be granted when it is clear to the Court that “no relief could be  
 2 granted under any set of facts that could be proven consistent with the allegations.”  
 3 *McGlinchy v. Shull Chem. Co.*, 845 F.2d 802 (9th Cir. 1988) (citations omitted).  
 4 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
 5 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
 6 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

7 A plaintiff’s complaint must allege facts to state a claim for relief that is plausible  
 8 on its face. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). A claim has “facial  
 9 plausibility” when the party seeking relief “pleads factual content that allows the court to  
 10 draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
 11 *Id.* Although the Court must accept as true the well-pled facts in a complaint, conclusory  
 12 allegations of law and unwarranted inferences will not defeat an otherwise proper [Rule  
 13 12(b)(6)] motion. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell*  
 14 *v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to  
 15 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
 16 conclusions, and a formulaic recitation of the elements of a cause of action will not do.  
 17 Factual allegations must be enough to raise a right to relief above the speculative level.”  
 18 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted).  
 19 *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police*  
 20 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

## 21 **B. Analysis**

22 The gist of Plaintiffs’ Complaint is that BLM has engaged in unreasonable delay or  
 23 failed to act on Plaintiffs’ Grazing Application. (Dkt. no. 1 at 1 & ¶ 1.5.) Plaintiffs thus  
 24 seek to compel BLM to act on their Grazing Application under the Administrative  
 25 Procedure Act (“APA”), 5 U.S.C § 706(1). The APA provides for suits to be filed by any  
 26 person “adversely affected or aggrieved by agency action within the meaning of a  
 27 relevant statute.” 5 U.S.C. § 702. Plaintiffs essentially contend that the challenged  
 28 agency action is BLM’s alleged “failure to act” as defined in 5 U.S.C. § 551(13.) Section

1 706(1) of the APA grants federal courts the power to “compel agency action unlawfully  
2 withheld or unreasonably delayed.”


3 In *Norton v. S. Utah Wilderness Alliance*, the Supreme Court explained the  
4 contours of section 706(1). The Court held that the definition of “failure to act” is “a failure  
5 to take an *agency action* — that is, a failure to take one of the agency actions (including  
6 their equivalents) [] defined in § 551(13),” which lists five categories of agency action:  
7 “agency rule, order, license, sanction or relief.” 542 U.S. 55, 62-63 (2004). The Court  
8 also found that under the APA, an agency can only be compelled to act if “action is  
9 legally *required*.” *Id.* at 63. “Thus, a claim under § 706(1) can proceed only where a  
10 plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required*  
11 *to take*.” *Id.* at 64.

12 Plaintiffs assert that the Secretary engaged in an unreasonable delay by failing to  
13 act upon their Grazing Application. (See dkt. no. 1, ¶ 1.5.) Plaintiffs presumably filed  
14 their Grazing Application pursuant to the Taylor Grazing Act (“the Act”). The Act provides  
15 that “[t]he Secretary of the Interior is *authorized* to issue or cause to be issued permits to  
16 graze livestock” 43 U.S.C. § 315b (2014) (emphasis added). However, the Act is a  
17 permissive statute; “[d]iscretionary action under a permissive type statute is exempted  
18 from judicial review under the Administrative Procedure Act.” *Mollohan v. Gray*, 413 F.2d  
19 349, 351 (9th Cir. 1969). Under the Act, the Secretary of the Interior “is authorized, but  
20 not required to issue or cause to be issued grazing permits to such persons as under his  
21 rules and regulations are entitled to participate in the use of the range.” *Id.* at 352  
22 (internal quotation marks omitted). Thus, the issuance or non-issuance of a grazing  
23 permit under the Act “is committed to agency discretion” and “is exempted from judicial  
24 review.” *Id.* at 352. Moreover, BLM’s delay on Plaintiff’s Grazing Application cannot be  
25 unreasonable when BLM has discretion under the Act whether to issue a permit on  
26 Plaintiffs’ Grazing Application. See *Norton*, 542 U.S. at 63. This Court thus lacks  
27 jurisdiction under the APA to order BLM to act on Plaintiffs’ Grazing Application. *Id.* at  
28 352.

1 **IV. CONCLUSION**

2 It is therefore ordered that Defendant's Motion for Judgment on the Pleadings  
3 (dkt. no. 40) is granted. Judgment shall be entered in favor of Defendant. The Clerk is  
4 directed to close this case.

5 DATED THIS 21<sup>st</sup> day of October 2014.

6   
7  
8 

---

MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE